IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 9, 2004

STATE OF TENNESSEE v. GREGORY L. LOFTON

Appeal from the Criminal Court for Davidson County
No. 98-A-473 Steve Dozier, Judge

No. M2003-01102-CCA-R3-CD - Filed September 7, 2004

The appellant, Gregory L. Lofton, was convicted by a jury of two counts of aggravated sexual battery and two counts of sexual battery, for which he received an effective twelve year sentence. There was no immediate appeal of the convictions. A delayed appeal was granted and the appellant filed a motion for new trial and amended motion for new trial. The trial court denied both motions and the appellant appealed. The following issues are presented on appeal: (1) whether the trial court erred in failing to instruct the jury on the lesser-included offense of assault; and (2) whether the trial court improperly sentenced the appellant by failing to apply a mitigating factor and enhancing the sentence two years after finding only one enhancing factor. For the following reasons, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed

JERRY L. SMITH, J., delivered the opinion of the court, in which JOE G. RILEY and ALAN E. GLENN, JJ., joined.

Cynthia F. Burnes, Nashville, Tennessee, for the appellant, Gregory L. Lofton.

Paul G. Summers, Attorney General & Reporter; Renee W. Turner, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Katrin Novak Miller, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

In 1992, the appellant, a Metropolitan Nashville police officer, married Sherrie, who had two children from a previous marriage. Sherrie's daughter, C.C.,[1] born June 8, 1982, was approximately ten years old at the time of the marriage. In 1993, the appellant and Sherrie had a child of their own.

Between Thanksgiving and Christmas of 1994, when C.C. was twelve years old, she and the appellant were in the "playroom" of their home cleaning up toys when the appellant began tickling her. She "fell down and was laying on the ground on . . . [her] back. Then he straddled me and he was . . . moving," rubbing his penis against her vaginal area for several minutes. The appellant also felt C.C.'s breasts through her clothes. She apparently tried to get up, but could not. She did not yell at the appellant because she was afraid that the appellant "would have hurt . . . [her]" if she did. She did not tell her mother about the incident "because . . . [she] was afraid the family would break up and . . . [the appellant] wouldn't be . . . [her] father."

At the time of the first incident, C.C. was in the sixth grade. Her teacher was Ms. McGee. During class one day, she passed a note to two of her friends, Karen Baker and Michelle Zeigler. The note read: "I do not know how to say this. But my step-dad is trying to have sex with me. But please don't tell anyone else. I won't tell anyone else. Tell your Mom." Ms. Baker took the note home and showed it to her mother, Vaunda Baker. The elder Mrs. Baker felt that C.C. needed to tell her own mother about the incident. Mrs. Baker did not tell anyone about the letter or what her daughter had told her, but later retrieved the note from her daughter's trash can and placed it in a lockbox that she kept in her closet for safe keeping.

The next incident occurred when C.C. was in eighth grade. One evening as C.C was preparing to go to bed, the appellant came downstairs into her room where he was "tickling . . . [her] again and . . . [she] fell on . . . [her] back." Again, the appellant rubbed his penis against C.C.'s vaginal area. C.C. did not tell anyone about the second incident because she was afraid of the appellant and still afraid that her family would break up if she told anyone.

The third incident occurred on a Saturday morning in October of 1997. C.C. had just gotten out of the shower and was wearing a white robe. The appellant asked her to "come over" so that he could "rub" her shoulders. C.C. obliged and the appellant rubbed her shoulders. The appellant then told her to lay down on the ground so that he could rub her back. C.C. laid down and the appellant proceeded to straddle C.C. The appellant rubbed his penis against C.C.'s buttocks over top of her robe for approximately five minutes. C.C. could feel the appellant's penis and tried to get up but

[1] It is the policy of this court not to refer to victims of child sexual abuse by name. Furthermore, we will refer to C.C.'s mother by her first name only in order to protect C.C.'s privacy. We intend no disrespect.

could not because "he was so big and he was sitting on . . . [her], holding . . . [her] down." C.C. tried to make several excuses to get up, telling the appellant that she needed to wake up her younger brother and had to get dressed. In response, the appellant told her that he had already turned the light on in her brother's room. The appellant eventually let C.C. up when she said that she needed to go get dressed. C.C. did not yell at the appellant because she was "scared of him" because he "was big and he was a policeman." She felt like he had a "short temper" because she had seen him punch a hole in the wall and hold her mother "by the neck" one time during an argument.

Once the appellant let C.C. go, she went downstairs and called her friend Karen Baker. C.C. called Karen because Karen knew about the incident that happened in sixth grade, even though the two had grown apart in the past several years. C.C. told Karen that "it happened again and that . . . [she] wanted somebody to come over." Karen called C.C.'s best friend and another friend using the three-way calling feature on their phone until she found someone to go over to C.C.'s house.

The appellant apologized for his behavior, telling C.C. if he could "take . . . [his] heart out right now, . . . [he] would." The appellant asked C.C. not to tell anyone about the incident. C.C. told her mother approximately a week later that the appellant had been "rubbing up against . . . [her] and touching . . . [her]." At the time of this incident, Sherrie was out of town at a gymnastics competition.

The appellant met Sherrie at a McDonald's restaurant several days later. He cried and told her that he had "touched . . . [C.C.] sexually" in October of 1997. He claimed that he must have "blacked out" because he did not remember the two other occasions.

The appellant also admitted the abuse to his friend and co-worker, Officer Bobby Davenport. The appellant went to Officer Davenport's apartment on a Friday night in 1997. When the appellant arrived at the apartment, he had a beer and his gun. He told Officer Davenport that he had "screwed up" and touched C.C. in an "inappropriate manner" and that it was sexual in nature. The appellant admitted that he kissed C.C. on the neck and reached up underneath her robe and touched her on the buttocks.

The next day, Officer Davenport called the Police Advocacy Support System ("PASS"), a counseling service for the police department, where he talked to Sergeant Ron Fielder, a peer counselor. Officer Davenport expressed his concern about the potential abuse with Sergeant Fielder. At some point not long thereafter, the appellant himself called PASS and spoke with Sergeant Fielder. Sergeant Fielder invited the appellant to come and speak with him in person. At that meeting, Sergeant Fielder told the appellant that he was required to keep their conversations confidential unless he felt the appellant was suicidal, homicidal, or that child abuse was involved. The appellant had initially called complaining of depression, but after hearing Sergeant Fielder's comments, chose to seek services elsewhere.

Detective David Imhof and Tonya Norfleet of the Department of Children's Services went to C.C.'s home at the beginning of the investigation. C.C. was interviewed by Tonya Norfleet. At

first, C.C. did not remember when the first incident occurred or that she wrote a note to her friends, Karen and Michelle, in the sixth grade. She later remembered the note.[2] C.C. was able to describe three separate incidents, one occurring in her bedroom, one occurring in the playroom, and one occurring in the tv room. As a result of the investigation, the appellant was eventually arrested. He was later indicted by the Davidson County Grand Jury on two counts of aggravated sexual battery and four counts of sexual battery.

At trial, the appellant took the stand and admitted that three incidents occurred with C.C., but that none of the incidents occurred in the "playroom" and all of the incidents occurred after C.C. turned thirteen years of age. He testified that the "playroom" was not called the "playroom" until at least 1996 because it was originally used as a bedroom for their youngest child. The room became a "playroom" when Sherrie began running an in-home day care in approximately 1996. He remembered two incidents in the fall of 1996 and one in the fall of 1997. He admitted getting on top of C.C. and rubbing his hips against her for a couple of minutes in a sexual manner. He testified that he felt terrible after each incident. He told the jury that his actions were "pure acts of sinful lust" that were brought on by "certain behaviors" of C.C.'s that "enticed" him. The appellant testified that he did not exert physical force on C.C. to make her do anything of a sexual nature and that he never threatened her in any way.

At trial, the jury was presented with two counts of aggravated sexual battery and two counts of sexual battery. The jury convicted the appellant on all counts. A separate sentencing hearing was held on July 2, 1999, where the trial court sentenced the appellant to ten years on each count of aggravated sexual battery to be served concurrently and one year on each count of sexual battery. At the sentencing hearing, the appellant commented that he would "just gladly accept any sentence that they hand down and will not, you know, we won't appeal it or anything. . . I'll just take my responsibility for it." The trial court ordered the one year sentences to be served consecutive to each other and consecutive to the two ten-year sentences, for a total effective sentence of twelve years. The judgments were filed on July 13, 1999.

The appellant did not file a motion for new trial and no waiver of appeal appears in the technical record. On May 14, 2002, nearly three years after the sentencing hearing, the appellant filed a pro se petition for post-conviction relief alleging among other grounds, ineffective assistance of counsel and that he did not knowingly waive his right to appeal his conviction. In the pro se motion, the appellant argued that he was told by his trial counsel to tell the judge that he did not want to appeal his conviction. The appellant claimed that he was under the impression that making this statement to the judge would in no way affect his right to appeal his conviction. In fact, he claimed that he was under the impression that trial counsel was going to file an appeal if he was convicted. The trial court appointed counsel to represent the appellant on the post-conviction petition, and an amended petition was filed on July 29, 2002. The State responded with a motion to dismiss the petition as untimely according to the one-year statute of limitations in Tennessee Code Annotated

[2] When C.C. called Karen Baker in October of 1997 to tell her about the latest incident, Vaunda Baker retrieved the note from the closet lockbox and turned it over to the authorities responsible for the investigation.

section 40-30-102. Apparently however, the prosecutor and the trial court ultimately agreed with the appellant's position that the applicable statute of limitations should be tolled. On January 6, 2003, the parties entered an agreed order allowing the appellant to seek a delayed appeal pursuant to Tennessee Code Annotated section 40-30-213.[3] The order states that "the statute of limitations should be tolled due to due process considerations, i.e. denial of right to appeal," and is signed by the prosecutor, the appellant's counsel, and the trial court.[4] On February 5, 2003, the appellant filed a motion for new trial and on March 18, 2003, an amended motion for new trial. After a hearing, the trial court denied both motions on April 7, 2003. The appellant filed a notice of appeal on May 20, 2003. This Court granted the appellant's motion to late-file his notice of appeal.

On appeal, the appellant challenges the trial court's failure to instruct the jury on the lesser-included offense of assault and his sentence. We note initially, however, that even though the petition for post-conviction relief appears to be time-barred by the statute of limitations contained in Tennessee Code Annotated section 40-30-102, the State does not raise this issue on appeal.[5] The trial court found that the statute of limitations should be tolled "due to due process considerations." As a result, the trial court granted the appellant a delayed appeal. There is no transcript of the hearing, if one took place, on the post-conviction petition in the record on appeal. Absent a record which would indicate otherwise, we must presume the decision of the trial court was justified. See State v. Jones, 623 S.W.2d 129, 131 (Tenn. Crim. App. 1981).

Lesser-Included Offense of Assault

The appellant first argues on appeal that the trial court "erred by not instructing the jury on all lesser included offenses, including an instruction on the crime of assault." Specifically, he argues

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[3] Tennessee Code Annotated section 40-30-213 was renumbered as Tennessee Code Annotated section 40-30-113 in 2003.

[4] We note that compliance with the applicable statute of limitations is a prerequisite to obtaining relief in the form of a delayed appeal. Handley v. State, 889 S.W.2d 223, 224 (Tenn. Crim. App. 1994). In addition a post-conviction court's *jurisdiction* to consider a post-conviction petition filed beyond the one year statute of limitations is contingent on a determination that the one year period must be tolled. Tenn. Code Ann. § 40-30-102(b). Since subject matter jurisdiction cannot be conferred on a court by waiver or agreement of the parties, see State v. Boyd, 51 S.W.3d 206, 210 (Tenn. Crim. App. 2000); and since the determination of whether due process requires a tolling of the statute is a highly fact-bound process, see Williams v. State, 44 S.W.3d 464 (Tenn. 2001); Burford v. State, 845 S.W.2d 464 (Tenn. 1992); when stipulating that due process concerns mandate a tolling of the statute of limitations, the parties would be well-advised to set forth facts in the stipulation or agreed order that mandate tolling. Since in the instant case we see nothing in the record to indicate the trial court's decision to accept the agreed order was incorrect, we will proceed to the merits of the appeal.

[5] The State notes that "the petition for post-conviction relief was filed over two years after the deadline for filing such a petition," but like the district attorney in the trial court the State on appeal does not contest the tolling of the statute of limitations. However, the State does argue that the appellant filed an untimely motion for new trial, thus waiving all issues with the exception of sufficiency of the evidence. We disagree. The appellant filed a motion for new trial on February 5, 2003, the thirtieth day after the trial court's order granting the delayed appeal. See Tenn. Code Ann. § 40-30-113(a).

that the facts as presented at trial made it "possible for a jury to have found the appellant guilty of assault rather than sexual battery if they had been so instructed." The State argues that assault was not considered a lesser-included offense of aggravated sexual battery at the time of the appellant's trial.

As used in the present case, aggravated sexual battery is "unlawful sexual contact with a victim by the defendant or the defendant by a victim [when] . . . the victim is less than thirteen (13) years of age." Tenn. Code Ann. § 39-13-504(a)(4). "'Sexual contact' includes the intentional touching of the victim's, the defendant's, or any other person's intimate parts . . . if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." Tenn. Code Ann. § 39-13-501(6). The elements of Class B misdemeanor assault, as relevant here, include: (1) an intentional or knowing physical contact with the person of another; and (2) a reasonable person would regard the contact as extremely offensive or provocative. See Tenn. Code Ann. § 39-13-101(a)(3).

Tennessee Code Annotated § 40-18-110(a) (1997) provides:

> It is the duty of all judges charging juries in cases of criminal prosecutions for any felony wherein two (2) or more grades or classes of offense may be included in the indictment, to charge the jury as to all of the law of each offense included in the indictment without any request on the part of the defendant to do so.

Tenn. Code Ann. § 40-18-110(a) (1997).[6] This obligation means that the trial court must instruct the jury on all lesser-included offenses if the evidence introduced at trial "is legally sufficient to support a conviction for the lesser-included offense." See State v. Burns, 6 S.W.3d 453, 469 (Tenn. 1999).

At the time of the appellant's conviction, our supreme court had determined that assault was neither a lesser grade offense nor a lesser-included offense of sexual battery. State v. Cleveland, 959 S.W.2d 548 (Tenn. 1997); see also State v. Tina Swindle, No. 01C01-9805-CR-00202, 1999 WL 254408 (Tenn. Crim. App. at Nashville, Apr. 30, 1999) (holding that assault is not a lesser-included offense of aggravated sexual battery). Approximately one year after the appellant's conviction, in State v. Swindle, 30 S.W.3d 289, 293 (Tenn. 2000), overruled on other grounds by State v. Locke, 90 S.W.3d 663 (Tenn. 2002), the supreme court determined that under part b(2) of the test

[6] This section was amended in 2001. Tenn. Code Ann. § 40-18-110 (Supp. 2001). However, the compiler's notes to the amended section state that the new section will govern trials "conducted on or after January 1, 2002." Id. Because the appellant's trial was conducted on May 17, 18, and 19, 1999, the statutory section transcribed above is controlling of the appellant's case.

announced in State v. Burns, 6 S.W.3d 453 (Tenn. 1999),[7] misdemeanor assault was indeed a lesser-included offense of aggravated sexual battery. In Swindle, the court determined that because "the element of extremely offensive or provocative touching establishes a less serious harm to the victim than touching for the purpose of sexual arousal or gratification," Class B misdemeanor assault is a lesser-included offense of aggravated sexual battery under part (b)(2) of the Burns test. Swindle, 30 S.W.3d at 293.

While at first glance it appears that the release of Swindle has no effect on the appellant's assertions herein because the determination that assault is a lesser-included offense of aggravated sexual battery occurred after the appellant's conviction, this case presents a rather unusual and interesting scenario due to the status of the appellant's appeal as a delayed appeal. Essentially, the grant of a delayed appeal places the appellant in the position he would have been in if a notice of appeal had been filed in a timely fashion. See Tenn. Sup. Ct. R. 28 § 9(D). Thus, the appellant in the case herein is eligible, because of the delayed appeal status, to take advantage of those changes in the law, if any, that occurred after his conviction but were required to be applied retroactively to cases in the pipeline.

The trial in the case herein occurred in 1999, prior to our supreme court's decision in Burns. Giving credit to the trial court, it was highly unlikely the trial court could have foreseen the impact of Burns and the cases that followed Burns, which have led to the establishment of several "new" lesser-included offenses, including that announced in Swindle. Our courts have applied Burns retroactively to cases which were either in the appellate "pipeline" or pending when the Burns decision was announced. See, e.g., State v. Stokes, 24 S.W.3d 303, 305 (Tenn. 2000). Again, due to the fact that the appellant was granted a delayed appeal, he is put in the position that he would have been in had a timely notice of appeal been filed. That appeal, had it been timely, would have most certainly been pending at the time of the court's decision in Burns, and conceivably at the time

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[7] In Burns, the following test for determining whether an offense is a lesser-included offense of another was established by our supreme court:

> An offense is a lesser-included offense if:
> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
> (1) a different mental state indicating a lesser kind of culpability; and/or
> (2) a less serious harm or risk of harm to the same person, property or public interest; or
> (c) it consists of
> (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Burns, 6 S.W.3d at 466-67.

of the court's decision in Swindle. Accordingly, in examining this issue, we must apply the standards set forth in Burns and the cases that have interpreted Burns, including Swindle.

Having determined that the appellant's delayed appeal would have been in the pipeline at the time of Swindle, we next consider whether the evidence was sufficient to support an instruction on the lesser offense. If an offense is found to be a lesser-included offense, the court must next ascertain whether the evidence justifies a jury instruction on the lesser-included offense. State v. Bowles, 52 S.W.3d 69, 75 (Tenn. 2001). To do so, the court must first determine whether there is evidence that "reasonable minds" could accept to establish the lesser-included offense. Burns, 6 S.W.3d at 469. The court must view the evidence liberally in a light most favorable to the existence of the lesser-included offense without judging its credibility. State v. Ely, 48 S.W.3d 710, 722 (Tenn. 2001); Burns, 6 S.W.3d at 469. Finally, the court must determine if the evidence is "legally sufficient" to support a conviction for the lesser-included offense. Burns, 6 S.W.3d at 469.

Based on Swindle, we determine there was evidence in the instant case which could have been accepted by reasonable minds to establish Class B misdemeanor assault, and the evidence was legally sufficient to support a conviction for that offense. On three separate occasions, the appellant rubbed his body against the victim's body. Two of the occasions started with the appellant tickling the victim and one of the incidents started when the appellant rubbed the victim's shoulders. All three times, the appellant was on top of the victim. In this case, we conclude that the trial court erred in failing to instruct the jury on Class B misdemeanor assault as a lesser-included offense of aggravated sexual battery because all three of these incidents involved contact that a reasonable person would regard as extremely offensive or provocative and the evidence would have been legally sufficient to support a conviction for the lesser offense. See Burns, 6 S.W.3d at 469. Though we find the trial court erred by failing to charge the lesser-included offense, we conclude the error is harmless.

Harmless error relating to the failure to charge lesser-included offenses must be shown "beyond a reasonable doubt." Ely, 48 S.W.3d at 727. The proper inquiry is "whether it appears beyond a reasonable doubt that the error did not affect the outcome of the trial." State v. Allen, 69 S.W.3d 181, 191 (Tenn. 2002). In making the harmless error determination, this court must "conduct a thorough examination of the record, including the evidence presented at trial, the defendant's theory of defense, and the verdict returned by the jury." Id.

Having conducted a thorough examination of the record, we can only conclude the sexual contact offenses were committed for the sexual arousal or gratification of the appellant. A reasonable mind could reach no other conclusion. In this case, the trial court instructed the jury on the elements necessary to prove aggravated sexual battery, specifically: a touching of the defendant's or the victim's intimate parts; that the touching was for the purpose of sexual arousal or gratification; that the victim was less than thirteen (13) years of age; and that the defendant acted either intentionally, knowingly or recklessly. The evidence at trial, particularly the admissions of the appellant himself, indicated that any touching that occurred was for his own sexual gratification. Further, the verdict reflects the jury determined the same. Accordingly, the failure to instruct on that

offense does not affirmatively appear to have affected the result of the trial. Thus, the trial court's failure to instruct the jury as to the lesser-included offense of Class B misdemeanor assault was clearly harmless beyond a reasonable doubt. This issue is without merit.

Sentencing

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. Tenn. Code Ann. §§ 40-35-103(5), -210(b); Ashby, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." Ashby, 823 S.W.2d at 169.

In balancing these concerns, a trial court should start at the presumptive sentence, enhance the sentence within the range for existing enhancement factors, and then reduce the sentence within the range for existing mitigating factors. Tenn. Code Ann. § 40-35-210(e). No particular weight for each factor is prescribed by the statute. See State v. Santiago, 914 S.W.2d 116, 125 (Tenn. Crim. App. 1995). The weight given to each factor is left to the discretion of the trial court as long as it comports with the sentencing principles and purposes of our code and as long as its findings are supported by the record. Id.

Turning more specifically to the facts of this case, the appellant complains that the trial court improperly sentenced him on the two counts of aggravated sexual battery because the trial court did not consider his employment record as a mitigating factor and because the trial court enhanced his sentence from eight years to ten years after finding only one enhancement factor. The State counters that the trial court properly considered the evidence, the sentencing principles, mitigating and enhancement factors, and correctly sentenced the appellant.

The appellant was convicted of aggravated sexual battery, a class B felony. Tenn. Code Ann. § 39-13-504(b). As a range I, standard offender, the applicable sentencing range is "not less than eight (8) nor more than twelve (12) years." Tenn. Code Ann. § 40-35-112(a)(2). Thus, the trial court should have started with the presumptive sentence of eight (8) years, enhanced the sentence within the range for any enhancement factors, and then reduced the sentence within the range for any mitigating factors.

During the sentencing hearing, the State argued that several enhancement factors should apply: (1) the victim of the offense was particularly vulnerable because of age, Tenn. Code Ann. §

40-35-114(5); (2) the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement, Tenn. Code Ann. § 40-35-114(8); and (3) the defendant abused a position of public or private trust, Tenn. Code Ann. § 40-35-114(16). The appellant, in contrast, cited the appellant's acceptance or responsibility, lack of prior criminal record, and work history as factors that should mitigate his sentence. After listening to the proof and reviewing the pre-sentence report and sentencing guidelines, the trial court determined that there were no mitigating factors that "might be applicable to this particular case." The trial court found one enhancement factor. In so doing, the court stated that

> [i]n terms of enhancement factors, . . . I do find, however, that the enhancement factor about abusing a position of public and private trust . . . I mean, there is . . . [the appellant], in his testimony, has been clear and even here today, that he acknowledges that he abused that position. And, ironically, in this particular case, and I think I can put more weight on that particular factor because it is an abuse of both positions; that is, he was a police officer, and there has been ample testimony about that, as well as a step-father. So that particular enhancement factor is present.

As a result of the presence of this enhancement factor, the trial court enhanced the appellant's sentences on each count of aggravated sexual battery from eight years to ten years.

After a de novo review, we cannot conclude that the evidence preponderates against the trial court's decision to impose a ten-year sentence on each count of aggravated sexual battery. In order to determine the application of the private trust factor, the court must look to "the nature of the relationship," and whether that relationship "promoted confidence, reliability, or faith." State v. Gutierrez, 5 S.W.3d 641, 646 (Tenn. 1999) (quoting State v. Kissinger, 922 S.W.2d 482, 488 (Tenn. 1996)). A relationship which promotes confidence, reliability, or faith usually includes a degree of vulnerability. It is the exploitation of this vulnerability to achieve criminal purposes which is deemed more blameworthy and thus justifies application of the enhancement factor. Accordingly, this enhancement factor applies where there is evidence that the nature of the relationship between the perpetrator and the victim caused the victim to be particularly vulnerable. If such a relationship or "private trust" is shown, the State must then prove that the perpetrator abused that relationship in committing the crime.

Turning to the record before us, the proof showed that the appellant was the step-father of the victim. They lived in the same household together and the appellant admitted that he was primarily responsible for the discipline of the children. The appellant felt that "to a degree" he was a strict disciplinarian. The victim testified that she was "scared" of the appellant because he "was big and he was a policeman" who had a "short temper." C.C. also testified that she was afraid to tell anyone about the incidents of abuse because she was "afraid the family would break up and he [the appellant] wouldn't be my father." The appellant was often seen in his police uniform at home, either before leaving for work or upon returning home from work. In conjunction with his position as an officer, the appellant was required to wear a gun and carry a baton. However, the appellant was not dressed in his uniform during any of the three instances of abuse. Therefore, it is arguable that

the trial court erred in determining that the appellant abused a position of public trust to commit the crime of aggravated sexual battery. Nevertheless, the proof clearly establishes that the appellant abused a position of private trust. Thus, we conclude that the trial court properly applied this enhancement factor to increase the appellant's sentence from eight years to ten years on each count of aggravated sexual battery. See State v. Dean, 76 S.W.3d 352, 381 (Tenn. Crim. App. 2001) (citing State v. Freeman, 943 S.W.2d 25, 32 (Tenn. Crim. App. 1996) (holding that improper application of enhancement factors did not require sentence reduction when other enhancement factors, but no mitigating factors remained)).

Further, we determine that the trial court was justified in refusing to use the appellant's work history as a mitigating factor. While a defendant is normally entitled to some consideration at sentencing as a result of his work ethic because a "consideration of a defendant's work history is consistent with the purposes and principles of the Sentencing Act," State v. Kelley, 34 S.W.3d 471, 483 (Tenn. Crim. App. 2000), the trial court herein determined that the appellant did not present any proof that his work performance "surpassed that which . . . [was] expected of him." The proof showed that the appellant was a police officer for approximately thirteen years and during that time received three different awards for unspecified acts. In light of Kelley, it was error for the trial court to refuse to consider the appellant's work history as a mitigator. However, we conclude that the error was harmless. The appellant's work history in this case, had it been considered as a mitigator, would have availed him little. There was no specific testimony about the appellant's work history, save the length of time he had worked for the police department and the fact that he had received three different awards for unspecified acts.

After reviewing the application of the preceding enhancement factor and the trial court's decision to apply no mitigating factors, we conclude that the evidence does not preponderate against the trial court's decision to impose a ten-year sentence on the appellant for each count of aggravated sexual battery. The appellant does not challenge his sentence on the two counts of sexual battery or the trial court's decision to order consecutive sentencing. When there are enhancement factors and no mitigating factors, there is no presumptive sentence and the court may sentence above the minimum in the range. Tenn. Code. Ann. § 40-35-210(d). Accordingly, we affirm the effective twelve-year sentence imposed by the trial court.

Conclusion

For the foregoing reasons, we affirm the judgment of the trial court.

JERRY L. SMITH, JUDGE